plaint was contrary to law and in violation of Section 7 of the Clayton Act (15 U. S. C. 18). Bank of America is included among the banks listed in said Paragraph 4 of the Board's Complaint. At the same time, the Board notified Transamerica that a hearing on the charges set forth in its Complaint would be held commencing on October 12, 1948, at the Board's offices in Washington, D. C., at which time and place Transamerica would have the right to appear and show cause why an order should not be entered by the Board pursuant to Section 11 of the Clayton Act, requiring Transamerica to cease and desist from the violation of law charged in the Complaint and to divest itself of the stock of some or all of the banks listed in Paragraph 4 of the Complaint. A certified copy of the Board's original Complaint and the Notice is annexed hereto marked Exhibit 1.

(4) On October 10, 1948, Transamerica commenced an action in the District Court of the United States for the District of Columbia to enjoin the Board from holding hearings on said Complaint. This suit was dismissed by the District Court on November 3, 1948 (80 Fed. Supp. 704).

(5) Thereafter, several motions were filed by Transamerica with the Board, the consideration and disposition of which delayed the actual commencement of the formal hearings until February 2, 1949, on which date the taking of testimony began before the Honorable Rudolph M. Evans, a member of the Board, who had been designated as Hearing Officer for such purpose. Such hearings have been continued, with various interruptions, since that date down to the present time, both at the offices of the Board in Washington, D. C., and at the offices of the Federal Reserve Bank in San Francisco. On July 19, 1949, the Board issued an amended and supplemental Complaint in the proceedings, a certified copy of which is annexed hereto, marked Exhibit 2. The hearings are now in recess but are scheduled to be resumed in Washington on July 17, 1950. It is expected that the hearings will be completed some time around the end of that month.

(6) The Board is informed and therefore avers that, between noon on Saturday, June 24th, and Monday, June 26th, next, Bank of America, unless restrained by this Court, will acquire the assets and contemporaneously assume the deposit liabilities, and thereby take over the banking business, of 22 banks and 6 branches of such banks now operating at various locations in the State of California. Transamerica owns all or substantially all of the stock of each of these banks and each such bank is named in Paragraph 4 of the Board's Complaint against Transamerica. These banks are as follows:

[There follows a list of each of the 27 locations of the 22 banks]

(7) If consummated the acquisition by Bank of America of the assets and banking business of the banks listed in Paragraph 6 above will deprive the Board and this Court of their respective jurisdictions under Section 11 of the Clayton Act, upon appropriate findings to order Transamerica to deprive itself of the stocks of some or all of such banks in such a manner as to restore actual and effective competition between any or all of such banks, including Bank of America.

(8) The Board is without statutory authority to protect its own jurisdiction or that of this Court by any order effective for the purpose of preventing the proposed acquisition by Bank of America of the assets and banking business of the banks listed in Paragraph 6 above.

WHEREFORE, the premises considered, the Petitioner respectfully prays as follows:

(1) That a temporary restraining order issue from this Court directing and commanding Transamerica and the Bank of America or either of them to refrain from consummating and effectuating any arrangement or undertaking which will result in Bank of America acquiring the assets or banking business of any or all of the banks listed in

Paragraph 6 hereinabove pending the final outcome of this proceeding.

(2) That the Court issue a rule directing Transamerica and Bank of America, and each of them, to appear at such time and place as the Court may direct, and show cause why the Court should not issue an order enjoining said corporations and each of them, and their agents, attorneys, successors, and assigns, and all persons in concert or participation with them, until after final determination by the Board of the proceedings now pending against Transamerica under Section 11 of the Clayton Act, hereinabove described, from consummating or effectuating any arrangements or undertaking which would result in Bank of America acquiring any or all of the assets or banking business of the banks listed in Paragraph 6 above.

(3) That this Court, upon return of said rule to show cause, issue an order restraining said corporations until after final determination of the proceedings now pending before the Board against Transamerica under Section 11 of the Clayton Act, from consummating or effectuating any arrangement or undertaking which would result in Bank of America acquiring any or all of the assets or banking business of any of the banks listed in Paragraph 6 hereinabove.

(4) That this Court grant such other and further relief as may be just and proper.

Respectfully submitted,

J. Leonard Townsend,
*Solicitor,*
Board of Governors of the
Federal Reserve System,
2000 Constitution Avenue,
Washington, D. C.
*Attorney for Petitioner.*

Gregory O'Keefe, Jr.,
2000 Constitution Avenue,
Washington, D. C.,
*Of Counsel.*

STATE OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO, *ss:*

J. LEONARD TOWNSEND, being first duly sworn, deposes and says:

I am Solicitor for the Board of Governors of the Federal Reserve System, the petitioner herein.

I have read the foregoing petition and know the contents thereof, and I am familiar with the proceedings which are now pending before the Board of Governors of the Federal Reserve System against Transamerica Corporation, to which reference is made in said petition.

The statements of fact contained in the foregoing petition are true to the best of my knowledge, information, and belief.

/s/ J. LEONARD TOWNSEND

Subscribed and sworn to before me this 23rd day of June, 1950.

/s/ ELIZABETH A. MEARES
*Notary Public*

In and for the City and County of San Francisco, State of California.

## APPENDIX C. (R. 254-255)

**Affidavit of Preston Delano, Comptroller of the Currency.**

DISTRICT OF COLUMBIA, SS:

Preston Delano, being duly cautioned and sworn, deposes and says:

That he is the present duly qualified, appointed and acting Comptroller of the Currency of the United States, and that he has been such since October 24, 1938.

That in granting the branch permits to the Bank of America National Trust and Savings Association of San Francisco, California on June 20, 1950, the Comptroller of the Currency considered the public interest involved in the related acquisition of assets and assumption of liabilities of banks being replaced by the branches. Whenever a national bank applies for authority to establish a branch, the approval or disapproval of the Comptroller is based on a study and investigation of all relevant factors, one of the most important of which is the effect on the public interest of each aspect of the transaction. This case was no exception.

That the branch applications here involved were known by the Comptroller of the Currency to be in contemplation of the proposed takeover by Bank of America of the business of other specified banks and that factor was fully considered in determining that approval of the applications and the granting of the branch permits were in the public interest. Included in the other phases considered in passing upon such applications are:

1. Is the quality of the bank's management adequate to justify branch expansion?

2. Does the bank have asset problems that are of sufficient importance to be considered a definite factor militating against branch expansion?

3. Is its capital structure adequate in relation to the bank's asset problems, total resources and volume of operations? Is it reasonably adequate to meet the requirements of an enlarged asset and deposit structure which the new branch will create? If inadequate, are definite plans being formulated to provide additional capital?

4. Will the new branch enable the bank to better serve and protect existing business now carried at the Head Office or its other branches?

5. Is the general character of the bank's management of existing branches satisfactory, and are such branches being operated on a sound and profitable basis?

6. Will the proposed branch, by virtue of its location, come into direct competition with existing banking facilities? If so, will the existing banking facilities be able to maintain themselves as profitable units against the competition of the proposed new branch? In other words, will the proposed branch create an over-banked situation? The rights of existing banking facilities to remain undisturbed and free from additional competition are carefully weighed against the rights of the prospective branch to be permitted to enter the area as a competing unit.

7. The population and economic character of the area or community the proposed branch will serve are weighed to determine (a) whether the proposed branch is reasonably necessary to serve adequately its current or near future banking needs, (b) that the proposed branch is reasonably assured of sufficient business to permit profitable operations or is capable of being indirectly profitable as a feeder or servicing agent of business carried on the books of Head Office or other branches.

The Comptroller's records indicate that the Chairman of the Board of Governors of the Federal Reserve System was kept generally informed of the status of these branch

applications and was notified at least as early as the middle of April 1950, of the intention to grant the branch permits in connection with the contemplated increase of the capital of the Bank of America.

Further deponent says not.

/s/ PRESTON DELANO

Subscribed and sworn to before me this 3rd day of July, 1950.

/s/ RUTH H. BIGLOW
Notary Public, District of Columbia.
My commission expires April 30, 1954.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1950

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Nos. 322, 323

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TRANSAMERICA CORPORATION, SAM H. HUSBANDS, BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, AND L. M. GIANNINI, *Petitioners,*

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

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**On Petitions for Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit.**

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## BRIEF FOR THE RESPONDENT

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### OPINIONS BELOW

The opinions of the Court of Appeals (R. 72-82; 155-166) are not yet reported.

### JURISDICTION

The orders entered below as to which certiorari is requested were entered on June 23, June 24 and July 13, 1950 (R. 25-27; 68-71; 173-177). The petitions for

writs of certiorari were filed on September 20, 1950. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

## QUESTIONS PRESENTED

1. Whether, prior to the entry of a final order by an administrative agency which is currently proceeding under Section 11 of the Clayton Act, a court of appeals has jurisdiction under 28 U. S. C. 1651 to prevent ouster of its ultimate and exclusive jurisdiction to enforce and review final orders of administrative agencies under the Clayton Act.

2. If so, whether the circumstances disclosed here called for the exercise of that jurisdiction.

3. Whether the Federal Reserve Board has authority to enforce Section 7 of the Clayton Act with respect to banks.

4. Whether the requirement that the establishment of a branch of a national bank be approved by the Comptroller of the Currency impairs the power of the Federal Reserve Board to enforce Section 7 of the Clayton Act.

## STATUTES INVOLVED

The statutes involved are set forth in the appendix to the petitions.

## STATEMENT

On June 24, 1948, the Board of Governors of the Federal Reserve System (hereinafter referred to as the Board) commenced an administrative proceeding against petitioner Transamerica Corporation (hereinafter referred to as Transamerica) under the provisions of Section 11 of the Clayton Act (15 U. S. C. 21) (R.

7-8). That section provides *inter alia* that the Board shall have authority to enforce compliance with Sections 2, 3, 7 and 8 of the Act "where applicable to banks, banking associations, and trust companies". The Board's complaint charged Transamerica with violating Section 7 of the Act (15 U. S. C. 18) which prohibits, among other things, the acquisition by one corporation of the stock of two or more other corporations engaged in commerce when the effect of such acquisitions may be to substantially lessen competition between the companies so acquired, to restrain commerce, or to tend to create a monopoly.

The Board's complaint in the Clayton Act proceeding alleged, in substance, that Transamerica, a large holding corporation controlling extensive banking and nonbanking interests, had been engaged continuously since its organization in 1928 in acquiring the capital stocks and banking businesses of independently owned and operated banks located in California, Oregon, Washington, Nevada and Arizona. It charged that Transamerica had been organized in 1928 by A. P. Giannini to acquire the stocks of petitioner, Bank of America (then known as Bank of Italy) and of other companies and banks which prior to 1928 had been under the general direction and control of A. P. Giannini. Over a period of more than 40 years Transamerica and its predecessors are alleged to have acquired almost 700 independently operated banking offices in the five-state area, most of which were merged into one or another of the large branch banking institutions controlled by Transamerica. The complaint further alleged that Transamerica now controls some 49 banks, operating 598 branches with deposits totaling in excess of 6½ billion dollars; and that the effect of Transamerica's acquisition of the stocks of these banks may be to sub-

stantially lessen competition between such banks, or to restrain commerce in the commercial banking business, or to tend to create a monopoly in the commercial banking business in the five-state area or portions thereof. Included among the 49 banks which the complaint charges are now controlled by Transamerica are petitioner Bank of America and the 22 California banks which are the subjects of the present litigation (R. 7-25).

Hearings on the Board's complaint commenced on February 2, 1949, and have continued with various interruptions down to the present time. They were resumed on October 16th last and it is expected that they will be finally concluded within a short period of time.

On June 23, 1950, the Board, having learned that arrangements were about to be consummated between Transamerica and Bank of America whereby the latter would purchase the assets and business of the 22 Transamerica-owned California banks above referred to,[1] filed its petition in the Ninth Circuit under the all-writs section of the Judicial Code (28 U.S.C. 1651) seeking an order enjoining the proposed acquisitions (R. 3-7). In its petition below the Board called attention to the pendency of the Board's Clayton Act proceeding against Transamerica. It pointed out that the proposed takeovers of the 22 banks by Bank of America were scheduled to take effect at the close of business on Saturday,

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[1] Petitioners contend that the Board had been apprised several months earlier of the Comptroller of the Currency's intention to grant permission to Bank of America to branch these institutions and was therefore lax in bringing its present action. See R. 254. The affidavit of Mr. McCabe (R. 177, 181-182) Chairman of the Reserve Board, shows, however, that at least until receipt of the Comptroller's letter of June 20, 1950 (R. 250-252), stating definitely that the applications had been approved, the Board did not believe it advisable to institute these proceedings. (R. 182) Regardless of these considerations, however, there can be no estoppel against the government to prevent enforcement of a statute such as the Clayton Act.

June 24th; that the effect of the take-overs if consummated would be to oust the Board of its jurisdiction under Section 11 of the Clayton Act upon appropriate findings to order Transamerica to divest itself of the stocks of these banks in such a manner as to restore them to actual competition with each other and with the Bank of America; that the proposed sale would likewise defeat the exclusive jurisdiction of the Court of Appeals to enforce or affirm such order as the Board might make with respect to these banks in carrying out the statutory objectives of the Clayton Act; and that the Board was without authority under the statute to protect either its own or the Court of Appeals' jurisdiction in the premises (R. 3-7).

At approximately 4 p.m. on Friday, June 23rd, the lower court issued ex parte a temporary restraining order against Transamerica and Bank of America enjoining them from "consummating or effectuating any arrangement or undertaking which [would] result in Bank of America National Trust and Savings Association acquiring the assets or banking business" of the 22 Transamerica-owned California banks. At the same time the court set the matter down for hearing on a rule to show cause returnable on Tuesday, June 27th (R. 25-27).

On Saturday morning, June 24th, the court convened to hear argument on a motion by Transamerica and Bank of America to dissolve the temporary restraining order (R. 68). The motion was accompanied by affidavits of various persons connected with Transamerica and the Bank of America (R. 30-68). At approximately 7 p.m. on that evening (24th) the court entered its order denying the motion to dissolve and extending the effective date of the injunction until "after final

determination" by the Board of its Clayton Act proceeding against Transamerica (R. 68-71).

On Monday morning, June 26th, the Bank of America opened new branches at each of the locations formerly occupied by the 22 Transamerica-owned California banks, Bank of America having physically taken over the assets and premises and having assumed the liabilities of such institutions (R. 105). On June 27th, at the Board's request, the lower court issued a rule directing petitioners and their respective presidents to show cause on June 30th why they should not be adjudged in civil and criminal contempt (R. 90-91). This date was extended at the request of counsel for petitioners to July 5th (R. 92-93). On that date the contempt trial was commenced against all of the petitioners except L. M. Giannini as to whom it was further extended to July 7th (R. 152-153). On the latter date additional evidence was adduced and the matter finally argued below (R. 153-154).[2] On July 10th the court entered its findings and opinion adjudging petitioners and each of them guilty of civil contempt and requiring them to purge themselves of such contempt within 30 days by restoring the banks to the status which they had occupied prior to the take-overs. The proceedings relevant to criminal contempt were dismissed (R. 155-166).

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[2] Petitioners contend that the contempt proceedings were unfairly conducted because the lower court required the parties to proceed by affidavit. This requirement was in conformity with the practice of the Ninth Circuit in such cases. Cf. *N.L.R.B.* v. *Red River Lumber Co.*, 109 F. 2d 157. Moreover, as the record plainly shows, there was no controversy as to the facts bearing upon petitioners' contempt. In any event the lower court stated that it based its "determination as to the facts solely and exclusively upon the answers and evidence presented by the respondents" (petitioners here) (R. 165-167). Furthermore, the order finding petitioners guilty of contempt is moot, petitioners having fully complied therewith. See *infra*, pp. 30-31.

On August 18, 1950, the court below, having satisfied itself that petitioners had fully complied with the order of July 13th, entered its order declaring petitioners to have purged themselves of their civil contempt (R. 646-647). Petitioners now seek review of the orders of June 23rd, June 24th and July 13th.

## ARGUMENT

The decision below is in accord with established principles. Although several features of the case have novelty, this results from the fact that the questions presented can arise only in the rare instance in which an administrative proceeding, and the jurisdiction of the enforcing court, will be frustrated unless extraordinary relief is granted. Furthermore, the present action to protect the Court's jurisdiction by a temporary injunction pending completion of the proceeding before the Federal Reserve Board is only ancillary to the case before the Board, and thus, to some extent, interlocutory in nature. Cf. *Alabama* v. *United States*, 279 U. S. 229. The questions raised by petitioners as to the interpretation of the Clayton Act will not be fully ripe for adjudication unless and until the Board, on a complete record, issues an order which will be reviewable in the courts.

The Comptroller of the Currency, who issued the permits to Bank of America to open branches at the locations of the 22 banks, differs with these views insofar as they relate to the effect of branch bank permits issued by him upon the power of the Federal Reserve Board to proceed under the Clayton Act, and has requested the Solicitor General to present to the Court a statement of his position. It is incorporated herein at pages 24-30, *infra*.

1. a. The lower court properly held that it had jurisdiction under the all-writs section of the Judicial Code

(28 U.S.C. 1651) to issue the injunctions herein. That section empowers any court created by Act of Congress "to issue all writs necessary or appropriate in aid of their respective jurisdictions". The courts of appeals have "exclusive jurisdiction" to enforce and review orders of administrative agencies issued under Section 11 of the Clayton Act (15 U.S.C. 21). The Board is currently proceeding against Transamerica under that section to determine whether the latter holds the stocks of banks in violation of Section 7 of the Act. If the Board's proceedings disclose such violation, the Board is authorized to issue an order, enforceable *only* by the courts of appeals, requiring Transamerica to divest itself of bank shares illegally held by it. Such an order, under the ruling of this Court in *Federal Trade Commission* v. *Western Meat Co.*, 272 U. S. 554, might appropriately include a requirement that the *assets* underlying such stocks be similarly disposed of by Transamerica.

In obvious anticipation of such an order, Transamerica attempted to freeze the fruits of its stock acquisitions of the 22 California banks by transferring the assets and business of such banks to Bank of America, also alleged to be controlled by it. This attempt was properly characterized by the court below as "an adroit design to circumvent the proceedings before the Board". (R. 81) If the transfer had occurred prior to the issuance of the injunction below, the board would have lost jurisdiction to enter, and the lower court would have lost jurisdiction to enforce and review, such an order. For this Court in *Arrow-Hart & Hegeman Electric Co.* v. *Federal Trade Commission*, 291 U. S. 587, has decided that, *after merger of the assets*, an administrative agency is powerless under Section 11 to order an unscrambling of the commingled

properties. Action by the lower court to protect its jurisdiction under such circumstances is clearly contemplated by the all-writs section. "Inasmuch as the [transfers] might prevent the adjudication of the questions involved, and thereby prevent a review thereof in the Circuit Court of Appeals, which had jurisdiction for that purpose, . . . that court had power to issue the writ". *McClellan* v. *Carland,* 217 U. S. 268, 280.

Petitioners contend, however, that, before a court of appeals may issue a writ in aid of its jurisdiction, it must appear that such jurisdiction is "already existing". In other words, they argue that until final order by the Board and the filing of the transcript below, the lower court had no jurisdiction to protect. We think this argument is without merit. The rule applicable here is no different from that which obtains with respect to the appellate jurisdiction of courts of appeals to review decisions of district courts. There, with certain exceptions created by statute, the court can review only final judgments of district courts after an appeal has been perfected by proper docketing with the court. Yet this Court has ruled many times that an appellate court may invoke its powers under the all-writs section to protect its appellate jurisdiction even though the case below has not proceeded to final judgment. As was said in *Ex Parte United States,* 287 U. S. 241, 246:

> "McClellan v. Carland, 217 U. S. 268, 280, laid down the general rule applicable both to this court and to the Circuit Courts of Appeals, that the power to issue the writ under R. S. § 716 is not limited to cases where its issue is required in aid of a jurisdiction already obtained, but that 'where a case is within the appellate jurisdiction of the higher court a writ of mandamus may issue in

> aid of the appellate jurisdiction which might otherwise be defeated by the unauthorized action of the court below.' See, also, Delaware, L. & W. R. Co. v. Rellstab, 276 U. S. 1, 5; In re Babcock (C.C.A.), 26 F. (2d) 153, 155; Barber Asphalt Paving Co. v. Morris, 132 F. 945, 952-956."[3]

While it is true, as pointed out by petitioners, that resort by an appellate court to its all-writ powers has generally been had to compel action or inaction by a subordinate *court,* nevertheless there appears to be no sound reason for concluding that its powers are limited to apply in such fashion. The all-writs section itself contains no such limitation. Indeed, its language is all-inclusive. Whatever writ is "necessary or appropriate in aid of" jurisdiction is the statutory test to be applied. Writs directed against third persons have been freely issued by district courts under the all-writs section. Cf. *Continental Bank* v. *Rock Island Ry.,* 294 U. S. 648, 675; *Looney* v. *Eastern Texas R.R. Co.,* 247 U. S. 214. In fact the power of the district court to protect its own jurisdiction (and therefore that of the court of appeals) explains why it has not been necessary for courts of appeals to issue such writs other than to district judges prior to final judgment in the district court. But under the Clayton Act, the court of appeals is the court of original jurisdiction.

Petitioners rely upon *Federal Power Commission* v. *Metropolitan Edison Co.,* 304 U. S. 375, and *In re National Labor Relations Board,* 304 U. S. 486. We think that neither of these cases supports their position. As pointed out in the opinion of the lower court (R. 76-77), *Metropolitan Edison* was a case in which the court of appeals issued an order relating to proceedings before the Power Commission which this Court

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[3] See also *Roche* v. *Evaporated Milk Association,* 319 U. S. 21, 25; *Ex Parte Republic of Peru,* 318 U. S. 578.

held amounted to an effort to exercise supervisory control over purely procedural steps taken by the Commission, which under no circumstances would be reviewable by a court. Under these circumstances this Court held that the all-writs section gave no support to the order of the court of appeals. In *In re National Labor Relations Board,* a party to certain proceedings before the Labor Board filed a petition in the Court of Appeals for a review of a cease and desist order entered by the Board. Before filing the transcript in the court the Board announced its intention to vacate the order. The court of appeals enjoined the Board from taking such action and required that the transcript be filed forthwith. The Board thereupon commenced an original proceeding in this Court under the all-writs section to require the court of appeals to vacate its order against the Board and to refrain from asserting appellate jurisdiction upon the petition then on file with that court. This Court, having found that the National Labor Relations Act permitted the Board to vacate or modify its decisions at any time prior to the filing of the transcript with the appellate court, ruled that the court of appeals was without jurisdiction to prevent the Board from exercising the statutory power conferred. This ruling is in harmony with the general principle that appellate review of orders of administrative agencies must await final action by such agencies. That proposition is not involved here, for no review of the Board's action was sought or undertaken. It is significant to note, however, that in *In re National Labor Relations Board,* this Court, *acting upon the original petition of the Labor Board,* granted relief to protect the jurisdiction of that agency.

b. Next, petitioners contend that the court below lacked jurisdiction because, under Section 11 of the

Clayton Act, proceedings to enforce or review the Board's order may be commenced either in the circuit where a violation has occurred or where the person resides or carries on business. Thus they point out that either the Board or Transamerica might ultimately elect to proceed in the Third Circuit where Transamerica, a Delaware corporation, "resides". Under these circumstances, they argue, the Ninth Circuit may never acquire jurisdiction and, hence, now has none to protect. But this argument, as pointed out by the lower court, would lead to a paradoxical conclusion, i.e., that at the same time it was *creating* jurisdiction in alternate courts to provide speedy and effective enforcement of the Clayton Act, Congress also was *withdrawing* from both power under the all-writs section to protect the jurisdictions which it had just created. As the lower court said:

> "To say that under the circumstances no court could do anything would lead to complete frustration. We cannot believe that Congress, in providing for alternate places of enforcement, thereby intended to withdraw in such circumstances any of the broad power granted by section 1651 of Title 28. We think the power granted by this section was intended to be adequate for all practical purposes sought to be served thereby." (R. 78)

c. Next, petitioners attack the jurisdiction below on the ground that other statutory provisions have reposed exclusive jurisdiction of a case of this kind in the district courts. In support of this contention they refer to Section 15 of the Clayton Act (15 U. S. C. 25) and Sections 1337 and 1348 of the Judicial Code (28 U. S. C. 1337, 1348). However, Section 15 of the Clayton Act merely establishes an alternative method of enforcement to that provided in Section 11 by vesting jurisdiction

in district courts, at the instance of a United States attorney, to prevent and restrain violations of Sections 2, 3, 7 and 8 of the Act—the same sections which the Board and other agencies are authorized in Section 11 to enforce via the administrative route. Clearly this section is no authority for the assertion that the court of appeals has assumed a jurisdiction vested exclusively in the district courts. Nor do Sections 1337 and 1348 of the Judicial Code appear to have any relevance here. Both sections simply confer original jurisdiction upon the district courts in certain classes of cases—actions under the antitrust laws under Section 1337 and actions brought against national banks by the United States under Section 1348. But neither grant of jurisdiction is exclusive, and neither could possibly be claimed to amend the all-writs section under which the court below acted.

2. The lower court not only had jurisdiction to issue the injunction here, but it also correctly appraised the factors bearing upon the question whether to exercise that jurisdiction. On the one hand it weighed the inconvenience, expense and hardship to petitioners and the stockholders and depositors of their respective institutions which it was alleged would follow if the bank take-overs were prohibited. Against these considerations it balanced the fact that, if the take-overs were not prohibited, all possibility of restoring the 22 California banks to the status of effectively competing institutions—a result clearly required by the Clayton Act if the Board's charges against Transamerica are well founded—would be lost. The lower court held that the need in the public interest for effective enforcement of the federal policy against monopoly and restraints of trade and commerce was "paramount" and "such as to outweigh any other considerations which have here been

presented to us" (R. 81). In resolving this question as it did the lower court acted in conformity with the board and universally accepted principle that, when private and public interests conflict, the former must yield to the latter.

Furthermore, in refusing to stay its hand the court below acted in a manner wholly consistent with its responsibilities as an integral part of the statutory machinery created by Congress for the enforcement of the Clayton Act. The fact that the order of an administrative agency under Section 11 is not self-enforcing and carries no threat of sanctions unless and until enforced by a court of appeals is manifest evidence of a congressional purpose that agency *and* court should produce a smooth and effectively functioning mechanism through which the statutory objectives of the Act might be fully realized. As the late Chief Justice Stone stated for this Court in *United States* v. *Morgan,* 307 U. S. 183, 190-191:

> "In answering these questions there are two cardinal principles which must guide us to our conclusion. The one is that in construing a statute setting up an administrative agency and providing for judicial review of its action, court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice, each acting in the performance of its prescribed statutory duty without regard to the appropriate function of the other in securing the plainly indicated objects of the statute. Court and agency are the means adopted to attain the prescribed end. and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through co-ordinated action."

Petitioners contend, however, that the lower court erred in not requiring a greater showing of the prob-

ability that the Board's case against Transamerica is well founded and therefore likely to result in an order by the Board requiring that company to divest itself of the stocks of the 22 California banks. But this argument misconceives the basic nature of the relief granted below. That relief, as we have seen, was solely to prevent an ouster of jurisdiction. The lower court carefully pointed to this fact in its opinion when it observed that what it had granted "is a writ of injunction, serving the same general purpose of the coordinated writs of mandamus and prohibition, and designed, not as an injunction in equity, however much equitable principles must be applied, but solely as a writ in aid of the jurisdiction of this court" (R. 78).[4] Petitioners' contention, if carried to its logical conclusion, would lead to the anomalous result of a trial on the merits in a court of appeals of issues involved in an administrative proceeding yet unconcluded, merely to protect the jurisdiction of that court later to enforce or review an order of such agency. Such a result would not only do violence to the procedural requirements of Section 11 of the Clayton Act, but also would cut across established principles announced by this Court requiring exhaustion of the administrative procedure prior to review by the courts of action by administrative agencies.

3. Petitioners argue that the judgment below is not warranted under the Clayton Act as construed by this Court in *Arrow-Hart & Hegeman Co.* v. *Federal Trade Commission*, 291 U. S. 587, and because that statute is for other reasons inapplicable. These contentions—which we believe in any event to be without merit—may

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[4] This language clearly disposes of petitioners' contention, argued at some length in both petitions, that the lower court purported to exercise "general equity jurisdiction".

more appropriately be raised at the termination of the proceeding before the Federal Reserve Board. Indeed, even if applicability of the statute were not plain, the court below would still have been warranted in protecting its jurisdiction *pendente lite* in order to permit the substantive questions to be determined in the statutory proceeding.

*a*. As we have seen, the *Arrow-Hart & Hegeman* case held that, after merger of assets, an administrative agency is without power under Section 11 to order reversal of the transaction. In so ruling, however, the Court specifically reaffirmed the ruling in the *Western Meat* case (272 U. S. 554) that "Where shares acquired in violation of the Act are still held by the offending corporation an order of divestiture may be supplemented by the provision that in the process the offender shall not acquire the property represented by the shares". (Id. p. 599) At most, therefore, the *Arrow-Hart* case establishes that (1) before assets are transferred by a Section 7 violator, they may be ordered divested along with the stocks they underlie, and (2) after transfer such an order is unwarranted. No question was before the Court nor did it purport to decide whether, while administrative proceedings are pending under Section 11, a court may arrest action by a would-be violator and preserve the *status quo* to prevent violation of Section 7. To interpret *Arrow-Hart* as preventing this is to construe the decision, as petitioners have done, as a derogation of the powers conferred in the all-writs section and as an affirmative aid to would-be violators. Such a contention is its own refutation.

b. Petitioners contend (Pet. No. 322, p. 26) that Congress never intended that Section 7 of the Clayton Act be enforceable by the Board, and hence that the lower court could have no jurisdiction to enforce an

order which the Board could not legally make. This argument is made despite the unequivocal language of Section 11 that "authority to enforce compliance with sections 2, 3, 7 and 8 of this Act . . . is hereby vested . . . in the Board of Governors of the Federal Reserve System where applicable to banks, banking associations, and trust companies." Petitioners argue that the legislative history of the Act discloses a congressional purpose to limit the Board's authority under Section 11 only to preventing violations of Section 8 of the Act. But "the province of construction lies wholly within the domain of ambiguity." *Hamilton* v. *Rathbone,* 175 U. S. 414, 421. The Court can hardly construe "sections 2, 3, 7 and 8" as meaning merely section 8. The legislative history cited by petitioners (Pet. No. 322, p. 26 n.) does not lead to any such strange conclusion.

c. Petitioners further contend that the failure of the Board for over 30 years to assert jurisdiction to enforce Section 7 amounts to "a practical administrative determination" indicating "a probable absence of jurisdiction," citing *Federal Trade Commission* v. *Bunte Brothers,* 312 U. S. 349, and *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.,* 337 U. S. 498. But, as was held in *Bunte Brothers,* jurisdiction "cannot evaporate through lack of administrative exercise." In both those cases the circumstances were such that the Commissions would have exercised their jurisdiction over the matters in question in the past if they had thought that such jurisdiction existed; the failure of the Commissions sooner to assert power under these circumstances was considered indicative of the Commissions belief that they did not possess the power. But no comparable situation to that in *Bunte Brothers* or *Panhandle* is present here. Transamerica is the only

bank holding company in the country which has pursued an unremitting policy of expanding its banking interests by acquiring the stocks of so many independent banks. It is also the only such company whose present holdings comprise so large a percentage of all banking offices and deposits over a substantial geographical area. It is, therefore, the only such company whose activities have brought it within the ambit of Section 7. Under these circumstances prior failure of the Board to assert jurisdiction to enforce that section can have no significance whatever in determining whether that power exists.

d. The Board's action in drafting and arguing for bank holding company legislation, as well as certain testimony of Board officials before Congress, likewise is claimed to demonstrate Board conviction that it lacks power to enforce Section 7. Again, the contention is without merit. From time to time since 1945 the Board has drafted and requested Congress to pass bank holding company legislation. But nowhere in such legislation nor in the arguments made in support thereof has the Board asserted the necessity for such power as a means of requiring a bank holding company to divest itself of bank shares for violation of the antitrust statutes; on the contrary, the provisions of each of those bills (S. 792, 79th Congress; S. 829, 80th Congress; S. 2318, 81st Congress) were designed, among other things, to *prevent the development* of monopolistic tendencies by requiring bank holding companies to obtain supervisory approval *before* acquiring the stocks of banks—a requirement in essence the same as that applicable to banks which desire to merge with other banks. (See testimony of Chairman Eccles in support of S. 829, 80th Cong., 1st sess., p. 9; testimony of Chairman McCabe in support of S. 2318, 81st Cong., 2nd sess., p. 14.)

Nor does the testimony of Board officials cited by petitioners support their contention. Apparently the reference to Mr. Eccles' testimony (Pet. No. 322, p. 27, footnote 9) is to a series of questions put to Mr. Eccles while he was testifying about an entirely different matter. The only portion of Mr. Eccles' testimony which could even remotely bear upon petitioners' contention is that which followed when he stated that Transamerica "in their purchase of stock of * * * corporations that have nothing whatever to do with banks is pursuing what, to my mind, is an improper and unsound policy."[5] When asked if the Board did not "have some power and authority to deal with that situation", he replied: "We do not". But this was not an admission that the Board could not order divestment of *bank* stocks if Transamerica held them in violation of Section 7 of the Clayton Act; it was merely a statement of the fact, which is still true, that no power exists in the Board to prohibit a holding company from simultaneously controlling both banks and non-banking enterprises, a situation which the Board regards as unsound from the standpoint of public interest. Petitioners have similarly distorted the testimony given by the Board's counsel, Mr. Townsend, to which reference is made. That testimony was given in support of the request of the Federal Trade Commission that Section 7 of the Clayton Act be amended to prohibit the acquisition of assets as well as of stocks having the prohibited effect. As submitted, the Federal Trade Commission amendment would have applied only to the

[5]Testimony of Reserve Board Chairman Eccles, April 5, 1943. Hearings before the Committee on Banking and Currency, House of Representatives, 78th Congress, 1st Session, on H. R. 1699, p. 133; Hearings before Subcommittee No. 3 of the Committee of the Judiciary, House of Representatives, 79th Congress, 1st Session, on H. R. 2357, p. 337.

acquisitions of assets by companies subject to the jurisdiction of the Commission and not to such acquisitions by companies subject to the jurisdiction of the other enforcing agencies named in Section 11. In his testimony Mr. Townsend called attention to this fact and to the further fact that, except for the Federal Trade Commission and the Board, all of such other agencies already had authority under other provisions of law to prohibit acquisitions of assets by companies subject to their respective jurisdictions. Therefore he requested that Congress approve the proposal of the Federal Trade Commission but that it be extended to cover situations within the Board's jurisdiction so that the powers of all of the enforcing agencies might be equalized. This testimony, instead of suggesting a Board conviction of lack of authority to enforce Section 7, plainly implies that the Board felt it already had jurisdiction under Section 7 respecting acquisitions of bank stocks having the prohibited effect.

e. Next, petitioners contend that the decision below is predicated upon the theory that the Board has the power under the Clayton Act to forbid the dissolution of banks. Of course, the court below made no such ruling. And if Transamerica, as virtually the sole stockholder of each of the 22 California banks, desires to place these banks in voluntary liquidation, it is entirely free to do so at any time, so long as compliance with applicable banking statutes is had. The ruling below simply forbids in such event the sale of the assets or businesses of these banks to Bank of America, which is alleged to be but another Transamerica controlled bank.

4. It is contended that the proceedings below constitute a collateral attack upon the action of the Comp-

troller of the Currency in granting permission to Bank of America to establish branches at each of the locations of the 22 California banks. This contention similarly is without merit. The Comptroller has sole administrative authority, under 12 U.S.C. 36, to authorize the establishment of branches by national banks. The Board has sole administrative authority to enforce compliance with Section 7 of the Clayton Act in the banking field. The Comptroller's authority to *authorize* the opening of branches of national banks certainly does not impair the power vested in the Board to enforce the Clayton Act.[6] Section 36 merely provides that:

> No branch of any national banking association shall be established or moved from one location to another without first obtaining the consent and approval of the Comptroller of the Currency.

But petitioners argue that the Comptroller, in deciding to grant permission to Bank of America to open these branches, did so with knowledge that they were to be used in the manner indicated and after considering the public interest in a competitive banking system. It is entirely proper for the Comptroller, in passing upon an application under Section 36, to determine whether the opening of a branch is in the public interest, and in doing so to take into account the policy in favor of competition embodied in the antitrust laws. Cf. *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 222-223. The Comptroller's affidavit (R. 254-5, quoted at pp. 25-26, n. 9, *infra*) and regulations (12 C.F.R., Section 4.5(a)(1)) do not, however, suggest that he takes the competitive situation into con-

[6] The Comptroller does not have power to pass upon the acquisition of the assets of one bank by another bank.

sideration except to determine that the establishment of a *new* branch will not bring about *excessive* competition in the community, or that he gives any attention to the policy embodied in Section 7 of the Clayton Act.[7] Even assuming the contrary, however, the fact remains, as pointed out in the decision below, that the Board and the enforcing court—not the Comptroller—has the responsibility for enforcing compliance with Section 7 "where applicable to banks". Unlike the provisions of some regulatory statutes, the National Bank Act confers no authority upon the Comptroller to confer immunity from the antitrust statutes. Cf. *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439, 456. Under these circumstances the Comptroller cannot deprive the Board of its statutory authority under Section 11. The Comptroller's authority is clearly not "plenary" in so far as the Clayton Act is concerned.

It is said that the Comptroller conditioned his approval of the opening of the branches upon the obtaining of new capital. This would not affect the relative authority of the Comptroller and the Federal Reserve Board. Nor does the fact that the Bank of America obtained the new capital estop the Board from objecting to the transfer of the 22 banks. If relative equities are to be considered, it must be noted that the Board's Clayton Act proceeding was instituted long before the Comptroller authorized the Bank of America to operate the 22 new branches to be acquired from Transamerica. In any event, it is nowhere suggested that the 22 banks needed additional capital if they were not to be incorporated in the Bank of America[8]—which,

[7] See paragraph 6 of the Comptroller's affidavit, set forth in note 9, p. 26, *infra*.

[8] Indeed, nine of the banks were not, prior to their absorption into Bank of America, subject to the supervisory authority of the Comptroller, because they were state banks, not national banks.

according to the Comptroller's letters (R. 64, 249), was undercapitalized entirely apart from the proposed acquisitions. Nor is it suggested that, in approving the proposed new management of the branches as competent, the Comptroller had found that the prior management was in any way incompetent, or indeed that the new management would be in any way superior.

A question is raised as to whether the Comptroller can operate successfully in his supervision of the banking system if the acquisition of assets to frustrate proceedings under the Clayton Act can be restrained at the instance of the Federal Reserve Board. Inasmuch as the case against Transamerica is the only proceeding against bank holding companies ever instituted under Section 7 of the Clayton Act, it is obvious that the decision below cannot disturb the general exercise of the Comptroller's authority. Moreover, the national banks supervised by the Comptroller are not permitted to own stock in other banks (12 U.S.C. 24). Hence, a national bank could under no circumstances become a respondent in a Clayton Act proceeding for violating Section 7, which deals only with stock acquisition. Therefore, the present problem can arise only in the unusual situation—of which this case is so far the only example—in which a company holding bank stock in alleged violation of the Clayton Act seeks to transfer the assets of the owned banks to a national bank; the Comptroller comes into the picture only when and because the national bank needs his permission to open branches on the sites transferred to it.

It is to be observed that under the controlling statutes the Federal Reserve Board shares with the Comptroller supervisory power relating to national banks. Under 12 U.S.C. 77, it is the function of the Federal

Reserve Board, after complaint by the Comptroller, to determine whether officers of national banks are violating any provision of the banking laws or have "continued unsafe or unsound practices in conducting the business of such bank", and, if so, to order their removal. Similarly, the Board is granted authority by 12 U.S.C. 248(a) to examine accounts and affairs of member banks, which include all national banks (12 U.S.C. 282).

Finally, it should be noted that the opening of the branches authorized by the Comptroller has not been prohibited by the court below but only stayed pending completion of the Clayton Act proceedings before the Federal Reserve Board. Only if the transfer of assets as an incident of the ownership of stock is ultimately found to be in violation of the Clayton Act will the restraint against the opening of the branches be permanent.

As has been indicated, the Comptroller of the Currency takes a different view as to the authority of the Federal Reserve Board and of the court below. He has asked that the following memorandum be submitted to the Court as a statement of his position:

> "*In view of the fact that the Comptroller of the Currency had authorized the establishment of branches of the Bank of America at specified locations, the Court of Appeals erred in preventing their establishment at such locations.*
>
> "A. *The Court below had no jurisdiction to override the decision of the Comptroller of the Currency, whatever jurisdiction it may have had to take action not inconsistent with his decision.*
>
> "The Comptroller of the Currency, on April 14, 1950, informed the Bank of America that he would approve the establishment of branches of the Bank of America which involved taking over the assets

and liabilities of certain banks and operating on the premises formerly used by the predecessor banks. He conditioned his approval on the raising of $70 million of additional capital, as well as on the actual take-over of the banks in question. Title was to pass at the close of business Saturday, June 24, and the new branches were to commence business the following Monday. On Friday, June 23, the Court of Appeals issued its restraining order, and on Saturday, the 24th, it issued an injunction against the Bank of America and the Transamerica Corporation. The Comptroller of the Currency was not made a party and was not heard in connection with the restraining order or the injunction. The injunction, as interpreted by the Court in subsequent contempt proceedings, prohibited the transfer of assets, which, in effect, prohibited the establishment of these branches, and required that ownership and management remain in the predecessors.

"Under the National Bank Act the Comptroller has jurisdiction in all matters involved in the organization, supervision and winding up of national banks, including their capitalization and the establishment of their branches. He also may fix the location of branches. 12 U. S. C. 36. The record (R. 254, 255) shows that in this case he took into consideration the adequacy of Bank of America's capitalization, the competence of its management, and the competitive situation which would result if the branches were established.[9] His regulations

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[9] "The affidavit of the Comptroller of the Currency (R. 254) states:

'That in granting the branch permits to the Bank of America National Trust and Savings Association of San Francisco, California on June 20, 1950, the Comptroller of the Currency considered the public interest involved in the related acquisition of assets and assumption of liabilities of banks being replaced by the branches. Whenever a national bank applies for authority to establish a branch, the approval or disapproval of the Comptroller is based on a study and investigation of all relevant factors, one of the most

governing the establishment of branches have been in effect for some time (12 C.F.R. 4.5) and plainly indicate that matters other than the adequacy of capitalization are considered in connection with establishing branches.

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important of which is the effect on the public interest of each aspect of the transaction. This case was no exception.

'That the branch applications here involved were known by the Comptroller of the Currency to be in contemplation of the proposed takeover by Bank of America of the business of other specified banks and that factor was fully considered in determining that approval of the applications and the granting of the branch permits were in the public interest. Included in the other phases considered in passing upon such applications are:

'1. Is the quality of the bank's management adequate to justify branch expansion?

'2. Does the bank have asset problems that are of sufficient importance to be considered a definite factor militating against branch expansion?

'3. Is its capital structure adequate in relation to the bank's asset problems, total resources and volume of operations? Is it reasonably adequate to meet the requirements of an enlarged asset and deposit structure which the new branch will create? If inadequate, are definite plans being formulated to provide additional capital?

'4. Will the new branch enable the bank to better serve and protect existing business now carried at the Head Office or its other branches?

'5. Is the general character of the bank's management of existing branches satisfactory, and are such branches being operated on a sound and profitable basis?

'6. Will the proposed branch, by virtue of its location, come into direct competition with existing banking facilities? If so, will the existing banking facilities be able to maintain themselves as profitable units against the competition of the proposed new branch? In other words, will the proposed branch create an over-banked situation? The rights of existing banking facilities to remain undisturbed and free from additional competition are carefully weighed against the rights of the prospective branch to be permitted to enter the area as a competing unit.

7. The population and economic character of the area or community the proposed branch will serve are weighed to determine (a) whether the proposed branch is reasonably necessary to serve adequately its current or near future banking needs, (b) that the proposed branch is reasonably assured of sufficient business to permit profitable operations or is capable of being indirectly profitable as a feeder or servicing agent of business carried on the books of Head Office of other branches.' "

"The National Bank Act has been regarded as constituting a complete system for the establishment and government of national banks, 'as in a separate code by itself'. See *Cook County National Bank* v. *United States* (1882), 107 U. S. 445, 448. See also *Texas & Pacific Ry.* v. *Pottorff* (1934) 291 U. S. 245, 253, in which the Court said: 'For the Act under which national banks are organized constitutes a complete system for their government * * *'. Again, in *Deitrick* v. *Greaney* (1940), 309 U. S. 190, 194, the Court said: 'The National Bank Act constitutes "by itself a complete system for the establishment and government of national banks." ' The Comptroller's jurisdiction thereunder in respect to all matters properly within his discretion has been held to be exclusive. It has been held that he is in respect thereto in no manner amenable to any court and that his action is not subject to review therein in the absence of fraud charged and proved. *Liberty National Bank* v. *McIntosh, Comptroller of the Currency et al.* (C.C.A. 4th, 1927) 16 F. 2d 906, and authorities cited therein; *Adams* v. *Nagle* (1938) 303 U. S. 532, 540; *Korbly* v. *Springfield Institution for Savings* (1917) 245 U. S. 330, 333; *Benedict* v. *Anderson* (C.C.A. 6th, 1934) 70 F. 2d 227. This extensive authority has been granted by Congress in recognition of the need for a single expert and informed management of the national banking system. Maintenance of public confidence has been thought to require certainty in administration of the system. See *Adams* v. *Nagle, supra,* at p. 540.

"The fallacy of regarding the Comptroller's jurisdiction as only permissive and not infringed upon by actions such as here taken is thrown into clear relief when one considers the effect of the Court's orders upon the objects which the Comptroller sought to accomplish. The Comptroller determined that the proposed transaction was in the public interest, having the competitive situation and all other relevant factors in view (as indicated

in his affidavit, set forth herein); nevertheless, his decision has been frustrated because of a mere *possibility* that it would prevent application of Clayton Act sanctions.

"In the light of the foregoing, it can hardly be argued seriously that the Comptroller's plenary authority with respect to branch banks is unimpaired by this proceeding. The position of the Court of Appeals may perhaps with more accuracy be stated as that the Board of Governors and the Court had supervening authority by virtue of the Clayton Act. Notwithstanding the public interest, which has hitherto been supposed to be overriding, in a stable, safe and well managed national banking system, the proposition appears to be that all this must wither away at the mere breath of an *allegation* that acquisition by Transamerica of the banks being taken over had been in violation of the Clayton Act. There is a serious question whether the Comptroller can operate successfully if his carefully worked out arrangements may be nullified and frustrated. It may be noted in this case that the Court's injunction originally made no provision for the operation of any banks at the sites in question after June 26 (R. 25, 70) and the communities would have been left in chaos if the management to be superseded had not carried on their former functions. There was no specific direction to the unit banks to resume functioning until July 10. (R. 166, 174) It may be conceded that it was not likely in this case that the communities would be left bankless, but if the precedent of such interference stands, it may quite well occur in another case.

"B. *If, however, the Court of Appeals had jurisdiction at some time to interfere with the Comptroller's management of the banking system, it did not have such jurisdiction until the Board of Governors issued a final order and definitely found that the Clayton Act had been violated.*

"It is a startling proposition that the findings of one executive official can be nullified by the Court on the basis of *mere charges undergoing investigation* by another agency. The Comptroller of the Currency needs the guidance of this Court in determining whether, in situations such as this, his official actions must be considered as tentative only and subject to veto at the election of another administrative agency, in the absence of a final order of such other agency, *e.g.*, in this case, an order that the Clayton Act had been violated. Such guidance (which, in view of the decision of the Court of Appeals in this case, can only be furnished authoritatively by this Court) is necessary to enable him to determine the extent to which, in fairness to banks under his supervision, he can enter into arrangements pertaining to their branch expansion, management and capitalization. Thus, in this case, such arrangements must be held in abeyance during the pendency of what probably will be a lengthy proceeding.

"Even in situations where the interests of another agency were not involved, this Court has not looked with sympathy on the premature exercise of appellate jurisdiction for the purpose of protecting the same. In *Federal Power Commission* v. *Metropolitan Edison* (1938) 304 U. S. 375, the Commission had issued preliminary orders, and at the instance of Edison the Circuit Court of Appeals had restrained the Commission in such way that 'the questions would not be moot if and when they come here'. This Court reversed, saying:

> 'The argument is that the Circuit Court of Appeals could intervene to protect its prospective appellate jurisdiction. We are of the opinion that this contention is unsound and that the Circuit Court of Appeals in the circumstances disclosed had no appellate jurisdiction to protect.'

Here the Board had issued no order whatsoever.

* * * * *

"In view of the foregoing, this case is reviewable under Rule 38, par. 5, Revised Rules of the Supreme Court, because a Court of Appeals:

'has decided an important question of federal law which has not been, but should be, settled by this court;'
'has decided a federal question in a way probably in conflict with applicable decisions of this court;' and
'has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.'

"In view of the foregoing, the Comptroller is desirous of obtaining a review by this Court for his guidance in future cases, since the jurisdictional questions raised by this case are likely to be encountered in other cases, if the opinion below stands."

5. Petitioners seek review of the order of July 13, which found petitioners guilty of civil contempt for having violated the injunctions issued on June 23 and June 24, and some of the errors alleged relate to that order. But the controversy as to the order of contempt is moot. The order of July 13 required petitioners to restore the branch banks to their prior owners within thirty days, or suffer fine and imprisonment. This order has been fully complied with and the Court below has entered an order purging them of their contempt (R. 646). Neither of the petitioners have been imprisoned, nor have they paid fines, and no order imposing such penalties now stands against them or either of them. And there are no further penalties or disabilities which can be imposed on them as a result of

the order which has now been satisfied. Under these circumstances, there remains no controversy with respect to the order of July 13 upon which this Court might appropriately act. *St. Pierre* v. *United States*, 319 U. S. 41; *Fiswick* v. *United States*, 329 U. S. 211.

## CONCLUSION

We have thought it advisable, in replying to the petitioners, also to submit for consideration by the Court the views of the Comptroller of the Currency, inasmuch as the Comptroller desires to urge that the petition be granted on the question he believes to involve a conflict between the powers vested in the Comptroller and those vested in the Board. The Government is, of course, entirely willing to have this controversy resolved, provided that the Court, after considering both presentations, is of the opinion that the dispute involves an issue of sufficient substance to warrant the issuance of the writ; but the Government does not believe, for the reasons given herein, that any of the other questions raised by the petition should be determined by the Court at this stage of the case, if at all. We urge, therefore, that in the event that the Court decides to issue a writ of certiorari such writ should be limited to the single issue as to whether the requirement that the establishment of a branch be approved by the Comptroller of the Currency impairs the power of the Federal Reserve Board to enforce Section 7 of the Clayton Act.

Respectfully submitted,

PHILIP B. PERLMAN,
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1950.

No. 323.

BANK OF AMERICA NATIONAL SAVINGS AND TRUST ASSOCIATION, and L. M. GIANNINI, *Petitioners*,

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, *Respondent*.

## SUPPLEMENTAL STATEMENT OF PETITIONERS.

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## SUPPLEMENTAL STATEMENT OF PETITIONERS.

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We do not propose in this statement to discuss the many errors of fact and law in the Solicitor General's brief. We feel compelled, however, to call to the Court's attention the nature and implications of the statements made by that brief concerning one of the vital issues in this case: namely, the nature of the showing that must be made to secure an injunction in a case of the sort here presented, assuming, which we deny, that the Court of Appeals has jurisdiction to enter an order of injunction in the premises.

The court below apparently conceded that the injunction must be justified on the basis of established principles of

equity. (R. 78). This means, we believe, that the record must show a prima facie case of violation of law, as a minimum.

Nevertheless, the Solicitor General argues that an injunction may properly issue against Transamerica and the Bank merely because the Board has made a complaint against Transamerica.

Bank of America is not a party to the Federal Reserve Board's proceedings, and may not be made a party. The Solicitor General concedes (p. 23) that "a national bank could under no circumstances become a respondent in a Clayton Act proceeding for violating Section 7 . . ." It is plain, therefore, that the Board's allegations in its complaint against Transamerica do not supply the evidence or prima facie case necessary for injunctive relief against Bank of America. This is particularly true in view of the complete absence of any evidence in this proceeding that Bank of America is controlled by Transamerica.

There is not one syllable in the record to support a prima facie finding that Transamerica Corporation controls the Bank; or that Transamerica is violating Section 7 of the Clayton Act; or that the purchase of the assets of the 22 banks by Bank of America was the result of a conspiracy between the Bank and Transamerica to impair the jurisdiction of the Federal Reserve Board or of a Court of Appeals; or that it could have any such effect.

The Solicitor General does not attempt to meet this problem squarely. Instead, his brief misquotes and distorts the opinion of the court below. On page 8 the brief states:

> "In obvious anticipation of such an order, Transamerica attempted to freeze the fruits of its stock acquisitions of the 22 California banks by transferring the assets and business of such banks to Bank of America, also alleged to be controlled by it. This attempt was properly characterized by the court below as 'an adroit design to circumvent the proceedings before the Board'. (R. 81)"

The court below did no such thing. The court's statement in its first opinion dated June 27, which has been erroneously represented by the Solicitor General's brief is as follows: "*With it all, whether there be any truth in it or not, the respondents laid themselves open to being suspected of contriving an adroit design to circumvent the proceedings before the Board.*" (R. 81)

In its subsequent opinion filed July 10, 1950, the court modified its characterization of the transactions between Transamerica and the Bank as "precipitate". It accepted "as true and uncontradicted" the affidavit of the Comptroller of the Currency that the Federal Reserve Board had knowledge of the proposed transactions as early as April 14, 1950—several months before the steps complained of were taken (R. 165). In fact, as the record shows without any dispute, the steps in preparation for the transfer of the assets of various of the 22 banks were begun several years earlier (R. 258-259; 299-300) and were widely publicized matters of general knowledge (R. 37; 263-265; 267; 336). The determination of the date for the completion of the transaction was the sole result of the Comptroller of the Currency's action in issuing the permits (R. 257-264). It followed promptly upon such issuance after completion of numerous prior steps including the sale of seventy-one million dollars of Bank of America's stock to increase its capital (R. 264-265; 268-272).

The plain fact of the matter is that there is no evidence in the record of any nature whatever to support an order against Transamerica or Bank of America, and that this absence of evidence cannot be disguised by the baseless and unwarranted effort to create an impression of a deliberate or precipitate effort to impair the jurisdiction of the Federal Reserve Board or of the Court.[1]

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[1] The contrary insinuation of the Solicitor General's brief can be justified only on the obviously unwarranted assumption that the Comptroller of the Currency was a party to a supposed design to frustrate a possible future order of the Federal Reserve Board.

If mere assertions by the Board can be substituted for the prima facie proof previously required to support the issuance of an injunction, the result will be an unprecedented extension of the power of government agencies to sequester or confiscate property without any hearing whatever. Here the power asserted is against a bank which cannot even be made a party to the pending administrative proceedings. We suggest that no stopping place is discernible if this principle is not repudiated by the Court.

Indeed the position taken by the Solicitor General goes further than to shift the burden of proof in cases where the government seeks injunctive relief. Applied to the present record, it means that the government need not rebut the evidence brought forward by the defendant, and may enjoin or sequester property on a record which contains uncontradicted affirmative evidence that the defendant has not violated the law. (E.g., R. 340, 254, 255, 291-293, 339, 305, 308, and Petition pp. 9, 10.) We do not think it can be said that such a radical position taken by the court below and now by the Solicitor General does not in the public interest deserve the careful consideration of this Court.

The Solicitor General's brief emphasizes the importance of the questions presented in this case. They are not only novel, as he concedes, but of great consequence. They apply to a great many government agencies. That portion of the Solicitor General's argument which opposes review itself establishes the unprecedented character of the action taken by the court below.

The questions presented are inter-related and not severable, as the Solicitor General suggests. The whole matter should be taken up so that a decision of the Court of Appeals which was made in the exercise of its assumed general

jurisdiction and related to issues of the utmost consequence should not stand unreviewed.

Respectfully submitted,

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November 7, 1950.